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THE INFLUENCE OF JEWISH LAW ON THE DEVELOPMENT OF JURISPRUDENCE IN THE CHRISTIAN ORIENT¹

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JEWISH law, by which we mean the Mosaic code amplified and carried further at the hands of the Talmudic doctors and to a less extent by Karaitic scholars, has exerted a powerful influence on the development of jurisprudence in the Christian Orient. Whether in Babylonia, Armenia, Syria, or Northern Africa, Christian judges pronounced sentence on the basis of Mosaic-Talmudic statements of law, Christian jurists delivered opinions according to Biblical-Talmudic or Karaitic legal maxims, and Christian codifiers incorporated Jewish law in their law-books. This

¹ The above paper constitutes a summary of the contents of the writer's following publications:

Beiträge zur mosaïschen Rezeption im Armenischen Recht. Sitzungsberichte der kaiserlichen Akademie der Wissenschaften in Wien, Band 157. Hölder, Vienna 1907.

Zur Geschichte des armenischen Rechts. Wiener Zeitschr. f. d. Kunde d. Morgenl., XXI. Hölder, Vienna 1907.

Die syrischen Rechtsbücher und das mosaïsch-talmudische Recht. Sitzungsberichte d. kais. Akademie, Band 163. Hölder, Vienna 1909.

In addition, comp. my essays "*Die Rechtsbücher der nestorianischen Patriarchen und ihre Quellen*," in: Anzeiger der Kais. Akad. in Wien, phil.-histor. Klasse, March 2, 1910; "*Die Rechtsbücher der syrischen Patriarchen*," *WZKM.*, Oct. 1910, 1-45.

As the present paper is merely in the nature of a review, it has been considered unnecessary to incorporate references or citations for the examples adduced.

fact comes home to us on a perusal of the Christian legal literature of those countries as far as it has become accessible through publication. To be sure, the influence of Jewish law does not manifest itself in all these legal codes with the same directness and with the same lasting impact.

Relatively speaking, the influence of Jewish law is minimal in the so-called *Syro-Roman Code* which appears to have been influenced to a greater extent by the *Hammurabi Code*.² Nevertheless, even that code seems to contain more of Jewish elements than is commonly recognized; only the fact does not appear to stand out as clearly and unequivocally as in the other codes. Thus a goodly number of the many obscure and hitherto unexplained decisions of that code may go back to Mosaic-Talmudic maxims of law which, however, appear to have undergone modification, as may be shown by the following example.

Syro-Roman Code, L. § 36: "When a man has two wives, one without *φερνῆ* and she bears him children, and another married legally, and she likewise bears him children, whether they all inherit equally?—The man may cause them to inherit equally, by designating them, the children of the wife without *φερνῆ*, as *strangers*, strange heirs, and, though *he call them not his children*, nevertheless by indicating his intention that they should inherit together with his children". Bruns and Mitteis are at a loss to explain on the basis of *Roman law* this curious decision

² D. H. Müller was the first to establish the Semitic element in the Syro-Roman Code. Comp. his *Gesetze Hammurabis*, 275-285; *Das syrisch-römische Rechtsbuch und Hammurabi*, Vienna 1905. Müller's arguments have been accepted *in toto* by Josef Kohler, and supplemented with reference to Talmudic law by myself. Comp. my review in this *QUARTERLY*, 1907, 605-611, and *Die syrischen Rechtsbücher*, *passim*.

that the illegitimate children may inherit only as strangers and not as children. It is likewise diametrically opposed to the laws of Hammurabi according to which illegitimate children may inherit only when they have been legally adopted as children. D. H. Müller, it is true, has ingeniously endeavored to remove this discrepancy, but his explanation is not altogether satisfactory, especially for the reason that we meet with this peculiar principle also in a case which has nothing whatsoever to do with *illegitimate* children. In the Old Armenian Code of Mechitar Gosh we read: "The daughter's son, however, does not inherit and receives no portion, unless the testator have appointed him heir during his life-time in writing, for a man's seed is indeed his daughter, but not his daughter's son. The same holds good of the step-child. A man, however, has the power, when he so desires, to appoint such as *heirs during his life-time*, to wit, *as strangers*". I have no doubt whatsoever that the peculiar aspect of this decision is due solely to its phraseology; so far as its contents go, it is identical with the following paragraph of the Mishna: "Whoso distributes his property orally (in a dying condition), assigning to the one heir more, to the other less, or placing them on an equal footing with the first-born, his words are *valid*. But when these assignments are made in the form of inheritance, he has said nothing (his words are *not valid*)". In a briefer and terser form the Tosefta: "When any one says, 'N. N. shall be my *heir*', he has said nothing; (when he says,) '*Bestow* my property *as a gift* upon N. N.', *his words are valid*". That is to say, one may transfer his property to such as *have no legal claim* in the form of *gifts*, but not as *inheritance*. This differentiation between a gift and a legacy corresponds in the Syro-Roman

Code and in the Old Armenian Code to the difference between *strangers* upon whom *gifts* may be *bestowed* and children who inherit.

The Mosaic-Talmudic law makes itself felt in a particularly emphatic manner and with an import which is unique in the history of jurisprudence in *Armenian law* as it has come down to us in the three Armenian codes: the Old Armenian Code of the Bishop Mechitar Gosh of the twelfth century, the Middle Armenian Code of Sempad of the thirteenth century, and the Polish-Armenian Code. Here it is not a question of *single* legal decisions and *single* legal maxims in which the influence of Jewish law becomes apparent; Mechitar Gosh on whose code the two other Armenian codes are constructed has directly taken over a large portion of the laws in Exodus, Leviticus, Numbers and Deuteronomy, and that in the *order* and to a large extent also in the *language* of the original. And where the language of the original has not been preserved it is due to the circumstance that a considerably large portion of the Mosaic material in the code of Mechitar Gosh appears not in its original Biblical form, but in the modified form resulting from the Talmudic tradition and interpretation.

The fact that Mosaic law has been taken over into Armenian law has been pointed out by F. Bischoff in his fundamental work on Armenian law. To a still larger degree it has been recognized by J. Kohler. Kohler and after him J. Karst, the editor, translator, and commentator of the Armenian code of laws, have also recognized and emphasized that Talmudic-Rabbinic influence makes itself particularly felt in the Old Armenian Code of Mechitar Gosh of the twelfth century. But it has been reserved for

D. H. Müller and myself to prove the singular magnitude and potency of the Talmudic-Rabbinic influence on the Code of Mechitar. A further result of my own investigations has been the knowledge that the more recent redaction of the Mechitar code, the code of Sempad and the Polish-Armenian code, even where they are at variance with Gosh, have been markedly influenced by Talmudic law.

Müller's work has been reviewed by me in volume XIX of this *QUARTERLY* (pp. 611-614). On the present occasion I may be permitted to single out from my investigations a few examples:

1. Gosh's Dastanagirk, II 48:

"Law concerning incendiaries.—When a house is set on fire through a voluntary act and the incendiary is caught, the following case is to be distinguished: When human beings perish in the fire, let painful punishment be inflicted upon his hand, *although according to law he is guilty of death*, in order that thereby the way to eventual repentance may be left open to him."

Now, the Mosaic law knows neither of arson committed on dwellings nor of death caused by incendiarism. The latter case, however, is met with in Talmudic law, though not quite in Mechitar's sense, and there indeed the penalty for such a crime is death. Gosh, however, knows this legal matter as Mosaic, for such is the meaning which he always associates with the term "law". Thus for Gosh *Talmudic* law was *Mosaic* law. The explanation for that is the fact that Gosh derived his Mosaic law not directly from the Pentateuch, but from compendia of the Pentateuch which, in the case of many laws, contained the rabbinic interpretation and even independent talmudic decisions.

2. Gosh's Dastanagirk, II 9:

Law pertaining to drunkards and to injuries done by them.—As for an injury committed in a state of drunkenness, no mitigation of the penalty is to be allowed according to our ecclesiastical law.

On which Karst remarks: "The legal principle..... goes back to *Can. 7 of Saint Sahak*..... That the same ran counter to *Armenian customary law* which apparently to the same extent as the *Græco-Roman* law allowed a plea for mitigation of the penalty on the ground of irresponsibility, follows with certainty from the emphatic manner in which it becomes necessary in the paragraph in question to secure the acceptance of this legal maxim, which can only be explained on the supposition that this maxim was not the current one".

The maxim of Saint Sahak referred to above which runs counter both to the Armenian customary law and the Græco-Roman law agrees in every respect with Talmudic law whence it has therefore been derived.

3. Dat., II 23 (Karst, p. 199): "Law concerning them that smite their father or their mother.—He that smiteth his father or his mother, shall be surely put to death (Exod. 21, 15). So according to law".

In a more recent version (488 749, Sin.) this chapter reads as follows:

"Concerning the reviling of one's father or mother. In the case of reviling, the law confers upon the father the authority to bring his son before the judge: if he confess his guilt and relapse not, he shall be rebuked and let go free; otherwise he shall be punished according to law, for according to the ancient law it was customary to hang him that reviled his father or his mother".

In the case of reviling one's parents the "law" has nothing to say about taking the son before the judge. This point is derived from the law concerning the rebellious son (Deut. 21, 18-21). There, however, according to the tenor of the text, the elders (judges) step in only when the rebuke (chastening) has remained ineffective, and then it is for the purpose of pronouncing sentence of death. The judges have nothing to do with the chastening itself which is the business of the parents. Thus also is the passage in question reproduced in Dat., II 70 (Karst, p. 199).

It is also strange that here the *judges* are spoken of and not, as in the Bible and in Dat. (II 23 and 70), the *elders*.

But particularly remarkable is the statement: "for according to the ancient (scil. the Mosaic) law it was customary to hang him that reviled his father or his mother". In the Bible we read merely: "shall be surely put to death"; the manner of death is not indicated.

Now, all this receives its explanation from the fact that we have before us in this variation of the original code one of the most interesting cases of borrowing from Talmudical literature.

That we are to understand by the expression "and though they chasten him" in the case of the rebellious son not, as is warranted by the context, parental reprimand, but judicial punishment by stripes, the Talmud infers by analogy from Deut. 22, 18, where we read of the slanderer of his wife: "and chastise him", by which expression punishment by stripes is meant. And in the Mishna (Sanhedrin 71 a) we read of the rebellious son: "He is warned in the presence of three men and is given the punishment of stripes (in the presence of three men). If he then sin again, he is taken before a court of law consisting of

twenty-three members". Hence, the later version of Dat., II 23, has applied not the *Biblical*, but the *Talmudic* law concerning the rebellious son to that pertaining to the reviler.

Now, the crime of reviling one's parents is punished according to the Talmud by *strangling*. This point was taken over by our version, except that it replaced the penalty of *strangling* peculiar to Talmudic penology by a *similar* penalty with which Armenian law was more familiar, hanging.

In its purely formal aspect we find it strange that in this later version of Dat., II 23, the law concerning reviling one's parents is brought into connection with a paragraph concerning the case "when children commit unlawful acts against *third* persons". In Dat. and the Code of Sempad we find nothing of the sort, whereas in our version we read immediately after the paragraph dealing with the reviling of one's parents as follows: "On the other hand, as for unlawful acts committed by children against third persons, in this case the law does not confer authority upon the father to indict his sons before the judge".

An explanation of the reason why these two paragraphs are connected is readily afforded by the circumstance that in the Mishna we find beside the regulation mentioned above concerning the rebellious son the following paragraph: "*When he steals from strangers and consumes what he has stolen in a locality belonging to strangers, (when he steals) from strangers and consumes in a locality belonging to his father, he is not dealt with after the manner of a rebellious son; (that is the case) only when he steals from his father and consumes in a locality belonging to a stranger*" .

Since our version took over the *one* regulation of the Mishna, it took over at the same time also the *other* regulation, giving it the form of a general principle that parents have no right of indicting their children in the case of unlawful acts committed by them against third persons.

To a similar degree the influence of Jewish law is manifested in the Syriac codes of three Catholic patriarchs of the Eastern Nestorian Church, edited by Eduard Sachau. All these three patriarchs belong to Islamic times and lived and held office in *Babylonia*. The oldest of them, Ḥenanisho Xenias, was in office as patriarch from 686 to 701 in Seleucia on the Tigris, in Arabic Elmadā'in. The two later patriarchs, Timothy and Jesubarnun, lived in the first quarter of the ninth century. Their official seat was *Bagdad*, the residence of the caliphs.

Ḥenanisho appears in the capacity of *judge*. He communicates directions in answer to questions submitted to him by subordinate judges, and in his function as supreme judge he reverses judgments passed by magistrates subject to his control. We have 25 documents, *judgments*, coming from him. On the other hand, his two successors were real codifiers of law. Timothy wrote a code consisting of 99 paragraphs which in the main deal with the law of marriage and inheritance. The code of Jesubarnun contains 130 paragraphs of which more than one-half (71) treats of the law of marriage (32 paragraphs) and the law of inheritance (39 paragraphs). The remaining 59 paragraphs contain regulations concerning ecclesiastic law, ecclesiastic and monastic discipline (24 paragraphs), the law of slaves (7 paragraphs), and other questions of law.

Not a word is said by the patriarchs concerning their sources. We naturally first think of *Islamic* influence.

But in the legislation of our patriarchs there is not the slightest trace of Islamic law. For that we have the testimony of so thorough a student of Mohammedan law as E. Sachau. Likewise, there is extremely little of *Græco-Roman* law to be found in the codes of laws by the Nestorian patriarchs. On the other hand, my investigations have resulted in proving that the *Jewish law* was the common source for Henanisho, Timothy, and Jesubarnun.

I may be permitted to single out just one point, the *law of inheritance*. The latter agrees in the codes of Timothy and Jesubarnun wholly with the Jewish system of inheritance, with this difference that in two points Timothy is at variance with *Talmudic* law and adheres to the Sadduceo-Karaitic opinions, whereas the system of inheritance propounded by Jesubarnun absolutely coincides with the Talmudic order of succession:

Talmudic law of inheritance	Timothy	Jesubarnun
1. sons (not daughters)	1. sons (not daughters)	1. sons (not daughters)
2. descendants of the sons	2. descendants of the sons	2. descendants of the sons
3. daughters	3. daughters	3. daughters
4. descendants of the daughters	4. descendants of the daughters	4. descendants of the daughters
5. father (not mother)	5. father and mother	5. [father] (not mother)
6. brothers	6. brothers (not sisters)	6. brothers
7. descendants of the brothers	7. descendants of the brothers	7. descendants of the brothers
8. sisters	8. sisters	8. [sisters]
9. descendants of the sisters	9. descendants of the sisters	9. [descendants of the sisters]

10. the father's brothers	10. the father's brothers	10. the father's brothers
11. descendants of the father's brothers	11. descendants of the father's brothers	11. descendants of the father's brothers
12. the father's sis- ters	12. the father's sis- ters	12. [the father's sis- ters]
13. descendants of the father's sis- ters	13. descendants of the father's sis- ters	13. [descendants of the father's sis- ters]
14. the mother's kin excluded	14. the mother's kin	14. the mother's kin excluded

I have been in a position to sum up the result of my investigation of the codes of the three Nestorian patriarchs in the following statement:

The legal decisions of the *catholicos* Mar ʿĪnanisho, the patriarch of the East, agree in the greatest number of instances entirely with the Talmudic law and *only* with that. The differences that subsist between the two have their analogies in Sadduceo-Karaitic traditions and in opinions of Talmudic authorities not accepted. At all events it is with *Jewish* legal principles and maxims alone that the judicial opinions of the patriarchs agree to so remarkable an extent; if we leave them out of account, many of these opinions would remain quite obscure and beyond explanation.

If we did not know that these judicial opinions emanate from a Syrian *catholicos* we might be tempted to look upon them as a code of responsa by a Talmudist with Karaitic leanings from the gaonic academies of Sora and Pumbeditha. Since, however, it is a Syrian patriarch that shows so thorough a knowledge of Talmudic law and Talmudic tradition, the phenomenon can be explained only by the as-

sumption that the patriarch did not merely casually associate with Jewish scholars, but rather had Jewish scholars as teachers and constant mentors.

The "Canons and Laws of the pious man of God Monsignor Timothy the *Catholicos*" agree in the greatest number of cases with the Talmudic law and in part can be explained only from that source. The agreements are to a large extent so remarkable that it is impossible to explain them as sheer casual coincidences; nor would it be sufficient to say that they point merely to an *influence* exerted by Talmudic law. We are constrained to assume in this instance *direct borrowing*. Several even of the discrepancies between the decisions of the *catholicos* and Talmudic law, indeed, can *only* be explained by legal principles which have come down in the Talmudic literature and in it *only*, though these ideas have not been raised to the dignity of legal norms. The influence of Talmudic law or, to speak more generally, of Talmudic literature shows itself with still greater potency in the code of the *catholicos* Timothy than in the legal decisions of the patriarch Hēnanisho. Hence, if any one it must have been Timothy that had Jewish scholars as teachers and mentors.

The influence of Jewish law and Jewish literature shows itself also in the code of Jesubarnun, though not with the same potency as in the works of Hēnanisho and Timothy, still potently enough that it can be demonstrated that even a man of the type of Jesubarnun who if anything was unfriendly to the Jews could not emancipate himself from the influence of his Jewish environment.

I have endeavored to show that, so far as Armenia is concerned, one of the moments favoring the infiltration of Mosaic-Talmudic legal norms and principles into the legal

practice of the Armenians was the intercourse and the relations between the Jewish and Armenian population. This moment is of still greater import with reference to Babylonia. In Babylonia, intercourse between Jews and Christians was much closer and the relation of the two strata of population to each other still more intimate than in Armenia.

We learn from Timothy and Jesubarnun that in many a district of Babylonia circumcision, and that "after the Jewish fashion", was customary among the Christian population.

Instances of friendship between Jews and Christians are attested by Jesubarnun.

Several of Jesubarnun's decisions go to show that *Jews and Christians were in the habit of contracting intermarriages*, and that *without the removal of the "impedimentum disparitatis cultus."*

A further point is that, as in Armenia, there was wanting a uniformed national system of laws.